

1 Over cable we feel it is quite possible, at least
2 our engineers tell us, that you are much more likely to get
3 the rated speed of your modem than you are over a twisted
4 pair of phone lines. So, if you've got a 56k modem you are
5 much more likely to achieve speeds of 56k, which we again
6 will be making that type of offering that Mindspring could
7 make, over the cable system much more attractive.

8 When it goes beyond that to high speed connections
9 of the type that At Home provides the simple fact is At Home
10 arrived in this market a number of years ago and made the
11 type of investment many other people could have made in
12 order to provide this type of capability. In fact, the
13 system that TCI has was co-engineered with At Home to
14 provide this service. It would be very difficult to break
15 that apart in some manner.

16 I think the overbuilder that was cited by Mr.
17 Brewer is in fact somebody that, at least on their website,
18 indicates that they are an affiliate of Mindspring. I'm not
19 sure what that means but I think it does make a point that
20 high speed internet over cable is not exactly the same thing
21 as over a phone line. There is a technology involved, there
22 is a great deal more engineering involved, it is just very
23 different and it requires a great deal of cooperation in
24 order to build a system that delivers that product. That
25 was, in fact, the case here.

1 COMMISSIONER NESS: So, you have now twice
2 suggested perhaps -- and I'm reading into your answer a
3 little bit -- that instead of having this be the focus of a
4 particular merger that instead perhaps this is an
5 appropriate thing for us to be addressing in a rule making
6 proceeding. Am I correct that you would not object to that?

7 MR. CICCONI: I would agree with the first part
8 but not the second, Commissioner.

9 (Laughter.)

10 What I would say is this, the Commission has ample
11 authority to monitor these things on an ongoing basis. If
12 there are problems that develop of course you have the
13 obligation to act. The point I'm making here is that all of
14 these problems that are being cited are simply hypotheticals
15 that are being cited by a number of people, they are not
16 actual problems affecting consumers, in fact, far from it.

17 As a result of this transaction consumers will not
18 only have, continue to have, all the choices they have today
19 even enhanced but additional choices.

20 COMMISSIONER NESS: So, basically, the Commission
21 should recognize its authority in this area but perhaps
22 forebear from exercising the authority to see what happens.

23 (Laughter.)

24 Thank you, I have no other questions.

25 CHAIRMAN KENNARD: Commissioner Tristani.

1 COMMISSIONER TRISTANI: Thank you, Mr. Chairman.
2 Ms. Inman, you raised three concerns: cross-subsidies; the
3 internet access, which has been explored a bit here; and,
4 local authority. I'm not quite sure what your concern was
5 about the local authorities. I'd like you to expand on
6 that.

7 MS. INMAN: Of course. As we are looking at a
8 merged company with merged services and possibly merged
9 customer service centers and the like, right now local
10 franchising authorities have the authority to resolve issues
11 directly with the company, directly with TCI's local
12 government entity. We fear that perhaps with the merged
13 services that some of those services that the cable company
14 currently provides will be combined and we won't have that
15 direct contact anymore, we won't have that direct impact.

16 Now, we wouldn't lose our franchising authority
17 over cable services but as the services themselves merge it
18 could get murky so we just ask that as you are looking at
19 telecommunications services versus cable services that that
20 authority be preserved in those issues.

21 COMMISSIONER TRISTANI: Earlier, and I'm tired so
22 I've forgotten what the piece of paper that you waived was
23 about, but you said we requested this. Could you talk a
24 little bit more about this piece of paper and also if you
25 could give us a copy and staff.

1 MS. INMAN: I will get a copy to you. This is in
2 the cross-subsidization concern. We had drafted a
3 resolution in the Denver Metropolitan Area on behalf of our
4 25 communities that conditioned the merger approval on,
5 among other things, this one phrase that simply says, and I
6 will read it to you, it is very short, that "neither
7 franchisee, TCI, and/or AT&T will increase rates for cable
8 services within the franchise area in order to cross-
9 subsidize non-cable services."

10 They told us over the weekend that they will not
11 approve it, they will not accept that, but what they will
12 agree to do is simply adhere to basic cable rate regulation.
13 So, my contention is if they are not planning on cross-
14 subsidizing why would this be a problem in the approval of
15 the merger?

16 COMMISSIONER TRISTANI: You asked at the end of
17 your testimony that we implement the proper protections.
18 You didn't call them conditions but you talked about
19 protections. What would you suggest the Commission could do
20 to address this concern?

21 MS. INMAN: Well, keep in mind that we're, at the
22 local level, we're looking at the same things that you are
23 looking at. We are looking at the same internet access
24 conditions and the cross-subsidization issues but we have
25 120 days to do it and that 120 days is expiring mid-January

1 for most of our communities. You have unlimited time to
2 look at these issues.

3 One of the things that I would suggest is perhaps
4 that the FCC issue, a notice of proposed rule making on both
5 of those issues, allowing us at the local level to condition
6 our approvals on the outcome of that rule making. That then
7 would allow the local communities and others to provide
8 input into that rule making procedure. It in essence, buys
9 us a little bit more time to have input into those issues as
10 well. As it stands now, we have a few weeks left in our
11 approval process.

12 COMMISSIONER TRISTANI: Mr. Chairman, I have one
13 more question for Mr. Kimmelman.

14 You also talked about conditions, proper
15 conditions, what would those be?

16 MR. KIMMELMAN: These are conditions -- I'm going
17 to agree with Mr. Cicconi, this is a very expensive
18 transaction and getting local competition has been extremely
19 difficult, if not impossible in most instances.

20 The conditions that we are looking at, we urge you
21 to look at, are conditions that make the promises come true
22 without cross-subsidy, without overcharging consumers,
23 without expanding monopoly. You have authority, under the
24 1992 Cable Act, to look at cable. Structurally, after March
25 1999, for upper tier even though rate regulation disappears,

1 up until March 1999 you have the authority to look at it in
2 a price regulation fashion.

3 I'm not suggesting that doing that for a few
4 months is meaningful here. I am suggesting, though, that
5 you look at structural protections that prevent the evasion
6 of the principles of the Act, the evasions of the rate
7 regulation section of the 1992 Act, not repealed by the 1996
8 Telecommunications Act. I suggest that you look at the
9 broad language on prevention of discrimination, use of
10 horizontal concentration, use of coercion, both in the
11 programming market and in this fast emerging high speed
12 internet access market.

13 I would suggest that if it is appropriate for AT&T
14 to come in with streamlining proposals, proposals to ensure
15 that these promises can be carried out, to suggest that it
16 be done through a rule making rather than the merger. I
17 think that is all really appropriate, if they really are
18 suggesting that, across the industry.

19 I think the purpose of conditions should be
20 exclusively to make sure that a \$48 billion transaction
21 either will accomplish the promises that are made or, to the
22 extent the market cannot bear that, and I don't hold them to
23 it, I don't think anyone can promise broad based
24 competition, we have yet to see whether it is feasible, but
25 all that they do they not abuse other bottlenecks, other

1 monopoly customers under your jurisdiction in their efforts
2 to do so.

3 CHAIRMAN KENNARD: Commissioner Powell.

4 COMMISSIONER POWELL: As much as one might commend
5 or applaud AT&T's interest in cable for telephony services I
6 think it is important to point out that they aren't the
7 first to try. I am a little astonished at how speculative
8 we are being about cross-subsidies and price bundles when
9 there are people out there doing it quite effectively as we
10 speak, unfortunately not represented on the panel.

11 Cox Communications in California has had, to my
12 understanding, a relatively successful run with respect to
13 the provision of basic bundled telephony and cable services,
14 as well as other companies, I think in the New York area,
15 Cable Vision and others. It seems to me to be responsible
16 here we would look at what is going on in those experiences.

17 If I am being correctly informed, the telephony
18 offerings are relatively significantly lower than that being
19 provided by local exchange companies. If I am being
20 correctly informed, their take rates are significant, that
21 is customers of all stripes seem very interested in the
22 potential for that bundle.

23 Indeed, as I understand it, and again I am more
24 than willing to be correct on these points but I'd rather
25 them be used rather than speculate about these things, that

1 we have not seen a significant amount of evidence of
2 dramatic cross-subsidy, that is, cable rate increases that
3 are being flowed to the telephony side for the purposes of
4 the efficiencies to lower the rates, not that the rates are
5 not increasing but anymore dramatically than they are
6 increasing in cable companies that are not providing the
7 telephone services.

8 So, I would sort of encourage everyone who is
9 going to enter this debate to try to flesh out some of those
10 issues. I have visited a good number of those companies
11 because of my interest in cable telephony and at least this
12 is the story that I've been told. I think that is important
13 evidence for the concerns that Mr. Kimmelman rightly raises
14 about cross-subsidy, and Ms. Inman, and the concerns about
15 whether there are significant public benefits in the cost of
16 the telephony option.

17 I would note, too, that I think this is important
18 that you cannot read the 1996 Telecommunication Act without
19 leaving it convinced that one of the bases for Congressional
20 optimism about the pace of local telecommunication was that
21 it envisioned that cable telephony was going to be a
22 significant ingrowth in that. That is not to say that that
23 answers the question but I think some of these concerns
24 being raised about whether it works economically or at what
25 cost and stuff can't be read outside the context of

1 Congress's optimism about this as an alternate provision of
2 local telephone service. So, I put that on the table.

3 The other thing that I might ask Mr. Brewer this
4 question. It has been explained to me by AT&T and some that
5 one of the difficulties of making the transport provision
6 available to other people is that there is an enormous
7 dynamic engineering function going on that allows them,
8 through their collective management, to keep prices at a
9 point at which they can sell them to residents.

10 I think AT&T has suggested -- is it proprietary --
11 I shouldn't tell what your rates might be but \$49.99. I
12 mean, we always hear magic numbers about \$40, \$40 to \$50.
13 Some have suggested that without the ability to have some
14 level of control, with respect to the full range of the
15 transport and the content, that yes you could do it but the
16 rates would be significantly higher than the acceptable
17 price point and, indeed, the benefits Mr. Kimmelman is
18 concerned about indeed are pushed even further toward higher
19 end customers, rather than kept down. Why don't I ask that
20 question before I ask another one. Are you the right one to
21 ask?

22 MR. BREWER: Yes, and I'm glad you asked because I
23 was dying to get a chance to respond to an earlier comment
24 about a claim of technical difficulties and expense in
25 supporting multiple ISPs on the cable plan.

1 I would very very strongly submit that those
2 technical difficulties do not exist and that the issues
3 involved in successfully serving customers with this last
4 mile transport capability are essentially the same in a one
5 provider environment or in a multi-provider environment.

6 We at Mindspring and others, I know, would be
7 eager to proceed in that into any depth of technical detail
8 that is required but I would very strongly assert that those
9 issues are not real, that the technical issues are
10 essentially the same be it a one provider environment or a
11 multi-provider environment.

12 COMMISSIONER POWELL: I guess the question I would
13 really want to know is -- I though you suggested you have
14 had one experience with this.

15 MR. BREWER: Yes.

16 COMMISSIONER POWELL: Are you confident that you
17 could offer service at a price point competitive with the
18 \$40 to \$50 range or that that would be accessible to the
19 vast majority of residents? That is, some have made the
20 argument that, yes, maybe technically you could do it but
21 that the expense to you would result in prices for cable
22 modem services that were sort of beyond the pale of most
23 average consumers or what marketers say are acceptable.

24 MR. BREWER: What our price would be would be
25 largely a function of what we paid for that last mile

1 transport. Right now our local loop cost per customer for a
2 \$20 per month revenue customer is in the vicinity of \$5 to
3 \$7 and I am anticipating that in the broad band scenario
4 that would be higher. We are able to generate a reasonable
5 profit on a \$20 customer with local loop cost in the \$5 to
6 \$7 range. So, there is that \$13 to \$15 of additional
7 revenue above and beyond what we pay for the local loop,
8 works for us.

9 I would submit that we are going to be much more
10 economic in operating the rest of the business than a cable
11 company or their new ISP partner that is sort of fresh to
12 the game. We have more scale, more experience and we, the
13 industry collectively, have vastly more and will be able to
14 operate more economically, not less.

15 Again, what the appropriate price for that last
16 mile transport is should be no different in a one provider
17 versus a multi-provider environment.

18 If I could just add one more thing, there is so
19 much more to providing a service that customers actually
20 find appealing than just speed, there is so much more.
21 There is user interface, making it easy to use, making it
22 easy to have a good experience.

23 Technical support is so critically important in
24 the ISP business and will only become more so as we move to
25 an environment where there is an always on connection and

1 multiple devices hooked up to that connection. Technical
2 support, in my opinion, really will become the primary thing
3 that a telecom provider gets paid for at the retail level.
4 To be forced to pick all of those other important customer
5 choice criteria based just on who can deliver the bits into
6 your house is a horrible unacceptable outcome.

7 COMMISSIONER POWELL: I would just submit that I
8 think one of the things that has to be examined and someone
9 has to put meat on it, it is fine, I think, theoretically,
10 to accept that there should be -- and I think it is a
11 defensible proposition that there would have to be some
12 reward for the return on an investment that I do think
13 companies took at their own great risks but the question I'm
14 struggling with, and I won't ask for follow up is, that that
15 price might lead to a retail price that is pretty
16 significant in terms of what customers are used. I don't
17 know the answer to how that comes out but it is at least a
18 subject of inquiry.

19 I thought I would also ask -- a lot of people have
20 discussed the concern about access as well as other context
21 -- I want to ask each of you to answer this question.
22 Irrespective of the merits of those arguments I understand
23 everyone wants presentation to suggest that it would be
24 equally true of any and every cable company that was
25 attempting to offer broad band service in this way and not

1 specifically TCI. Is that right, Mr. Brewer?

2 MR. BREWER: Yes. That is correct but I -- and I
3 am obviously not a legal scholar -- but as I understand the
4 jurisdiction which the FCC holds the context of an important
5 merger like this is one of the times when you have the most
6 latitude to address important consumer issues and this is,
7 to me, the most important consumer issue for telecom people.

8 COMMISSIONER POWELL: Let me follow up. Here is
9 what I'm worried about fundamentally, even if we did as you
10 asked what would you do about the other two-thirds of
11 America? Wouldn't you just need to turn around and ask us
12 to do the same thing in a broader more comprehensive way
13 with respect to everybody else?

14 MR. BREWER: Yes, absolutely.

15 COMMISSIONER POWELL: And so does anybody offer
16 the explanation as to why then we should take such a
17 comprehensive issue with as many complex issues on the plate
18 as people have described and attempt to address it
19 specifically in a merger context?

20 MR. ROELLIG: I guess I can try to respond to
21 that. I think the reason you should do it is because the
22 law requires that you do it.

23 COMMISSIONER POWELL: Where does --

24 MR. ROELLIG: The law requires that you look at
25 whether this is in the public interest. Clearly, it will

1 not be in the public interest if in fact you are taking a
2 company that due to its unique and really unique size and
3 also the various segments of the market that it has --

4 COMMISSIONER POWELL: Public interest doesn't
5 require with respect to the other two-thirds of the nation?

6 MR. ROELLIG: Well, public interest may require
7 with respect to the other two-thirds but you've got this
8 issue before you now and you have to look at whether it is
9 appropriate in the public interest.

10 COMMISSIONER POWELL: No, no, no. We have any
11 number of tools and institutional mechanisms available to us
12 for the consideration of the public interest standard and
13 its broad applicability and some seem to me more appropriate
14 than others. While I don't dispute the leverage point,
15 which I think is legitimately before us, the suggestion that
16 the public interest requires one tool over another I find to
17 be insupportable.

18 MR. ROELLIG: I guess my response is, number one,
19 that because this matter is before you you need to look at
20 the public interest. Number two, I think the fact, due to
21 the size of the entity, and what is being put together
22 requires that you look at what is going to happen in this
23 broad band marketplace if this merger is allowed to go
24 through in its current form. If it is, due to the size, due
25 to the speed to market, due to the unique advantages it is

1 going to have, in essence it will really sort of tilt the
2 marketplace for broad band services.

3 As far as trying to address it in some later rule
4 making that goes broader, again, looking at the pleadings of
5 AT&T they are basically taking the position that you don't
6 have the authority to do that. So, if you don't take the
7 opportunity now and if you don't deal with the issue now --

8 COMMISSIONER POWELL: Let me tell you, if you
9 don't have the authority in that context you don't have it
10 now. Okay. That is just the truth. I mean, we haven't
11 reached that question but I don't understand the argument
12 that the same authority that you are point to is the same
13 authority we would use in that context as we would have to
14 rely on in this context, I think.

15 MR. ROELLIG: Commissioner, my view, and I believe
16 the law support its is that in looking at a merger like this
17 you, in order to do the license transfers, you have to
18 determine whether it is in the public interest and that you
19 can, if you see a problem in the marketplace it will create
20 you can put conditions on the merger that will ensure that
21 it is in the public interest. I am positive that it would
22 make appropriate sense to put those conditions on to ensure
23 that we do not have a marketplace where there really is only
24 one player that has a clear competitive advantage and
25 basically is able to put together a proprietary network that

1 nobody else can.

2 COMMISSIONER POWELL: My last question, and I will
3 leave it at that because I don't want it to get too late
4 because I'm exhausted. There is a lot to be said about the
5 worrying about the tipping effect. We have heard it in the
6 last panel in network industry. That is, someone has an
7 advantage to the point that the network effect is that they
8 then gain a monopoly so that customers wouldn't substitute
9 for a new provider, even if one were to come along.

10 I do find it somewhat strained to suggest that the
11 tipping effect would occur at this stage in the development
12 of broad band in the context of, say, the next year which
13 would be at most the amount of time before the Commission
14 would undertake a rule making and, certainly, in light of
15 the AT&T case. I mean, Mr. Kimmelman suggested the
16 substantial financial investment and raw work that has to
17 happen before there is even a network, at least in TCI's
18 case.

19 I just ask for a sincere answer because I
20 seriously accept the risks of tipping effects in network
21 externalities. I just am not so sure that anyone has made a
22 credible case that we are at that moment, that that moment
23 is so imminent with respect to broad band capability that
24 not to do this in this context would result in the tipping
25 effect in the foreseeable future.

1 MR. ROELLIG: The way I would respond to that is
2 your question assumes that you can deal with it in a rule
3 making. Again, I think if you look at the AT&T pleading it
4 would be our view that you could not do that. So, the only
5 way you would be able to deal with it would be some
6 Congressional change. By the time there is a Congressional
7 change or by the time we work through our legal process
8 about the authority to do it in a rule making we aren't
9 talking about a year. My guess is you are talking two or
10 three years out and during that time period with what is
11 happening in the internet and the broad band market I
12 believe it would significantly tip the competitive
13 marketplace.

14 MR. KIMMELMAN: Commissioner Powell, if I could
15 just jump in. I think your questioning is very important.
16 I think you are actually right about legal authority. But,
17 I think the issue here is if this is a truly important
18 problem of open networks that the Commission has the
19 authority to look at, I believe it does, this is an
20 appropriate place to start to look. I'm not suggesting it
21 is the appropriate place to end the look. I'm not
22 suggesting it is different from the other players in the
23 industry.

24 I do think on some of the other issues, the
25 horizontal size and vertical strength of the TCI networks

1 and programming are significant towards the market plan that
2 AT&T has laid out and is different than just an incremental
3 few community approach by Cox, a very different kind of
4 company.

5 It has been presented in the license transfer as a
6 broad based investment approach. I think, given that that
7 is what they want you to look at is the public interest on
8 the positive side, it is appropriate to look at the danger
9 on the other side.

10 This particular, I think, you are absolutely
11 right, can be done -- can be looked at in a variety of
12 contexts but using Mr. Cicconi's own reasoning, if it is
13 within your jurisdiction to do this, and I believe it is, he
14 has made a very strong important point that the more
15 investment that is made the more that has to be undone if
16 you are changing the rules of the road.

17 If there is a legitimate problem here it is best
18 to deal with early on. I think it probably can be dealt
19 with cooperatively with a company that seeks to do so many
20 other things with a \$48 billion transaction, that is a
21 matter of convenience, not leverage, a matter that ought to
22 be dealt with broadly throughout the industry though. I do
23 not think it is a one company problem.

24 MR. CICCONI: Might I respond, Mr. Chairman?

25 CHAIRMAN KENNARD: Please.

1 MR. CICONI: Just very briefly, Commissioner. I
2 think it is important to recognize that the practical effect
3 if there was a conditioned imposed just on this one merger
4 is that you would end up with a company in this industry
5 that was hobbled by conditions that the rest of the industry
6 would not have. I think if that was your point -- that was
7 certainly the point I was trying to make earlier when I
8 mentioned that this was an industry wide issue.

9 Obviously, we don't think conditions of that
10 nature are appropriate in either context but they are
11 certainly not appropriate from a legal standpoint to be
12 going in and picking out one company in an industry and
13 imposing conditions on that that are not imposed industry
14 wide.

15 I would just like to make one other comment too
16 because I think we should be flattered by the fact that
17 U S West regards us as such a potent competitor here in all
18 of these areas where right now we have zero market share and
19 they have got about 99 percent. I think it is important to
20 keep in mind that when one talks about conditions of this
21 nature and hears from an RBOC discussions about anti-
22 competitive effect and the competitive threat and things of
23 this nature we are talking about a competitive threat from
24 somebody with zero market share in these areas from somebody
25 that has got in excess of 90 percent. I think that is an

1 important point to keep in mind.

2 MS. INMAN: If I might... We were approached,
3 local franchising authorities were approached by the
4 internet service providers and asked to include these as
5 conditions of our mergers. I'm not a lawyer. I'm probably
6 one of the few non-lawyers on the panel here today, yet I've
7 heard legal arguments on both sides of this issue provided
8 to us by the industry.

9 I think that, to answer your question,
10 Commissioner, I think it is just an opportunity to look at
11 that now. This is the first opportunity presenting itself.
12 In my comments I simply urged that if you apply this type of
13 condition that it simply be applied in a fair manner at a
14 reasonable price. So, the local franchising authorities
15 certainly wouldn't be that that type of access be provided
16 at no cost but in a reasonable manner.

17 CHAIRMAN KENNARD: Commissioner Furchtgott-Roth.

18 COMMISSIONER FURCHTGOTT-ROTH: Thank you, Mr.
19 Chairman. I would like to just note for the record my deep
20 admiration and respect for Mr. Gamboa who obviously came to
21 this hearing at great expense and great disruption to his
22 personal schedule and left early to go to his 11 year-old
23 daughter's recital in San Francisco. I believe that any
24 father with that dedication to his daughter is a man to be
25 respected.

1 COMMISSIONER POWELL: I think he's an expert.

2 COMMISSIONER FURCHTGOTT-ROTH: Yes, I'm only sorry
3 that --

4 COMMISSIONER NESS: Or mother, I would add in
5 passing.

6 COMMISSIONER FURCHTGOTT-ROTH: Absolutely. Mr.
7 Cicconi, I would like to extend my admiration to you for
8 being a good sport today, for putting up on a panel where
9 you had not just two people suggesting lots of things you
10 may have found a little distasteful but a few more than
11 that.

12 I'm intrigued. I would like to follow-up some
13 comments by Mr. Roellig about the public interest standard
14 in the transfer of licenses. I simply would like to note
15 that in Section 310 it makes no reference to mergers, the
16 same standard by statute would apply to most routine of
17 license transfers, frankly, Mr. Roellig, many of which
18 U S West may have been on the giving and receiving end in
19 recent years.

20 I would like to ask you, Mr. Roellig, and you, Mr.
21 Cicconi, if you think, since you all have had many license
22 transfers in recent years, if you all have any clear
23 indication of whether or not the Commission would apply a
24 higher public interest standard to one type of license
25 transfer than another and, particularly for you Mr. Roellig,

1 why you think that it should -- where in the statute you
2 think it should apply based on a merger in particular.

3 MR. ROELLIG: To respond to your question,
4 Commissioner, I believe that, first of all, why would you
5 look at this one as compared to maybe a transfer of a
6 license in Des Moines? The reason you do is that this is
7 clearly a unique situation of license transfer.

8 COMMISSIONER FURCHTGOTT-ROTH: Where in the
9 statute does it say that?

10 MR. ROELLIG: Well, you have to look overall in
11 what is in the public interest. I would say that when it
12 is, frankly, something that may be pretty minor under those
13 circumstances you may say, "It is easy for me to see this in
14 the public interest." I think when you are dealing with a
15 major merger then you look at the license transfers relating
16 to those and you could say, "This may have a big public
17 interest affect and it may not." So, I think you have to
18 look --

19 COMMISSIONER FURCHTGOTT-ROTH: Is there anything
20 bigger than Exxon/Mobil?

21 MR. ROELLIG: We'll wait and find out. I don't
22 know. But, I believe when you look at the transfer that is
23 occurring the statute requires that you look at the public
24 interest of standard and --

25 COMMISSIONER FURCHTGOTT-ROTH: But does it ask for

1 a different public interest standard for one license
2 transfer versus another?

3 MR. ROELLIG: I would say, "No." I would say you
4 have to look at all the facts, look at the impact on the
5 market. Again, a license transfer for a small community in
6 Des Moines may have very small impact on the market but what
7 we are looking at here has the potential to dramatically
8 impact a growing market, which is the broad band market. We
9 heard comments about this being an issue about telephony.
10 It is not an issue about a voice-grade telephony.

11 As a matter of fact, if you go through AT&T's
12 pleadings you don't even find commitments as to when they
13 are going to be in the telephony market, you do find in
14 their announcements commitments about when they are going to
15 be in the broad band digital market. They plan to be, I
16 think, 90 percent by the end of the Year 2000. So, that is
17 the market we ought to be looking at and seeing whether this
18 transfer will be in the public interest but for some
19 conditions that could be placed on it.

20 COMMISSIONER FURCHTGOTT-ROTH: Could the
21 Commission do the same thing to U S West on a routine
22 license transfer?

23 MR. ROELLIG: I believe it could.

24 COMMISSIONER FURCHTGOTT-ROTH: And request
25 U S West to do all sorts of things that may be completely

1 unrelated to that transfer in Des Moines, could the
2 Commission go to U S West and say, "We would like to see
3 unbundled network elements in pricing in Washington State
4 and if you don't do that we will hold up the license
5 transfer in Des Moines?"

6 MR. ROELLIG: I would have to talk to the lawyers
7 to find out exactly whether it could be totally unrelated
8 but I guess what I'm saying is with respect to the
9 conditions we are talking about today they are totally and
10 integrally related to the issues before the Commission.

11 COMMISSIONER FURCHTGOTT-ROTH: Is that your
12 position, Mr. Cicconi?

13 MR. CICCONI: Will, let me at least try and state
14 it, Commissioner. First of all, I wouldn't want to be in a
15 position here of suggesting to the Commission how it ought
16 to interpret the statutes and authorities that govern its
17 role in these areas. What I would say, though, is that to
18 me public interest speaks much more in terms of impact on
19 consumers, not impact on Mindspring, not impact on
20 U S West's competitive position but impact on consumers.

21 I think that is consistent with much of the other
22 authorities vested in the Commission and, in fact, the whole
23 reason for being of the Commission. We certainly don't
24 dispute the Commission in anyway, the Commission's authority
25 to take a look at this merger.

1 Having said that, I think when one gets into
2 conditions one can have different views depending on what
3 conditions are being discussed. I wouldn't suggest that
4 consistent with that authority the Commission could not
5 impose conditions on certain mergers. What I would suggest
6 is that the type of conditions that have been discussed in
7 this merger would not be appropriate, they would not be wise
8 from a public policy standpoint, they would certainly not be
9 wise from the standpoint of consumers. We feel that they
10 would have a discriminatory effect in terms of singling out
11 one company in the industry for special conditions that
12 would not bind others.

13 COMMISSIONER FURCHTGOTT-ROTH: Thank you. Thank
14 you, Mr. Chairman.

15 CHAIRMAN KENNARD: Thank you. I just had a couple
16 of clean-up questions in the interest of making sure we have
17 a complete record here. Mr. Cicconi, I was listening to you
18 very carefully today and I didn't hear you respond to the
19 request from Commissioner Ness that you respond to Mr.
20 Roellig's request that you somehow reconcile the arguments
21 that you have made on behalf of AT&T in the Section 706
22 proceedings where you have requested that this Commission
23 require full-unbundling of the telco networks with your
24 position here on behalf of AT&T today that we should not
25 look at unbundling as a remedy in the cable context.

1 I heard you bash U S West in response to that
2 question but I didn't hear you specifically reconcile those
3 two arguments and I'd really like to hear that.

4 MR. CICCONI: I apologize, Commissioner, if I
5 skipped over that a little quickly. Our position is, as we
6 stated in a number of filings, the fact is we feel the
7 Telecom Act distinguished between these two areas of
8 telecommunications and cable. It does not distinguish
9 between voice and data, we feel, in its definition of
10 telecom services. As such, we felt pretty strongly, as we
11 have stated, that they have to meet the requirements of
12 Section 251.

13 Our feeling is that by breaking one out from the
14 other that that is simply a dodge by U S West and others in
15 an attempt to get around requirements in the
16 Telecommunications Act.

17 CHAIRMAN KENNARD: Another question that I think
18 was not asked to you specifically but I think the record
19 would be incomplete if I didn't pose this to you. As you
20 may recall, shortly after you announced this merger I made a
21 public statement in which I said that if this merger
22 represents a serious commitment to facilities-based
23 competition in telephony it is something that we should
24 certainly entertain and perhaps welcome.

25 What I have not heard from AT&T is specifically

1 when consumers are going to see the AT&T-TCI combination
2 actually deploy local competition in telephony for
3 consumers. I want to know your plans for doing that, when
4 we can say that consumers are going to get the benefit of
5 that service.

6 MR. CICCONI: We hope over the next couple of
7 years, Mr. Chairman. Obviously, there is a great deal of
8 money involved in this. TCI has already begun some of the
9 upgrades, nearly \$2 billion of upgrades are underway there
10 right now.

11 As Mr. Kimmelman has acknowledged, there is a
12 great deal of cost involved in that. We are hoping that
13 despite those rather daunting costs, assuming you get a
14 timely approval, that we will be on track to be at roughly
15 60 percent build out by the end of 1999 and upwards of 90 by
16 the end of 2000 and beyond that we hope to be completely
17 built out.

18 CHAIRMAN KENNARD: Further questions?

19 COMMISSIONER NESS: Just following up on that. Is
20 that co-terminus with offering telephony?

21 MR. CICCONI: Yes, Ma'am. The internet,
22 obviously, would come first because of the stages of the
23 build out but that would be involved in telephony, yes.

24 COMMISSIONER NESS: Co-terminus. In other words,
25 by the end of 1999 60 percent of the TCI systems would offer

1 telephony?

2 MR. CICCONI: I think that's right. I may have to
3 get back to you in terms of exactly where the overlaps are
4 there because there are two stages to the build out. I
5 believe the 60 percent does speak to a complete build out
6 though.

7 COMMISSIONER NESS: Is there still time for me to
8 ask a slightly different question?

9 CHAIRMAN KENNARD: Certainly. Go right ahead.

10 COMMISSIONER NESS: I just wanted -- I didn't --
11 in the idea of wrap up and cleanup here -- one aspect of the
12 AT&T-TCI merger is the disrobing, if you will, of Liberty
13 Media, putting it into another entity. There will, however,
14 be the chairman of that operation serving on the board of
15 AT&T, et cetera. And some of the relationships there raise
16 the question of whether in your, the view of AT&T-TCI,
17 Liberty Media would continue to be a vertically integrated
18 provider of programming and, as such, would continue to be
19 required to make its product available to satellite
20 companies and others.

21 MR. CICCONI: Commissioner, they would be
22 continued to be vertically integrated and they would be
23 subject to the program access rules.

24 COMMISSIONER NESS: Thank you.

25 Agenda Item: Closing Remarks

1 CHAIRMAN KENNARD: Are there any closing
2 statements from the bench? Commissioner Ness.

3 COMMISSIONER NESS: If I can do so, please. I
4 first want to thank all of the panelists from today. I know
5 it has been a very long day. Your schedules have been
6 discombobulated by virtue of our asking questions on what is
7 an absolutely fascinating series of topics and very
8 important ones for the American consumer. So, for me, this
9 has been an extremely helpful debate. My mind is and
10 continues to be very open to the arguments that have been
11 presented and the arguments that will continue to evolve as
12 we review the record in these proceedings.

13 We had a very good and robust discussion about the
14 public interest standard that would be employed here.
15 Obviously, much of what we do today and what we decide as we
16 review these mergers will depend on what that public
17 interest standard entails.

18 I would note that Congress, in entrusting us with
19 the public interest standard, expected that it would be
20 exercised carefully with discretion. Such discretion, for
21 example, was exhibited in our recent decision on MCI
22 WorldCom. If folks were to read our WorldCom MCI order you
23 would see that there were an awful lot of issues that had
24 been raised where we declined to include them in our merger
25 analysis. For example, there were issues that we thought

1 were better addressed by the NLRB, issues that we thought
2 would be better addressed by the EOC, issues we thought
3 could be better addressed by some of the state commissions,
4 issues that we thought could better be addressed in rule
5 makings, and issues we thought could better be addressed in
6 pending adjudicatory proceedings.

7 As we look at these issues, certainly there have
8 been a lot of issues that were raised and where and how we
9 address those issues will certainly be a part of our
10 deliberations.

11 Some might prefer, perhaps as a matter of economy
12 that we hold en banc hearings on other topics like oil
13 company mergers -- only kidding -- but indeed, we take the
14 issue of public interest very seriously, in my view, will
15 review such matters for the benefit of the consumer.

16 Thank you very much, Mr. Chairman, for holding
17 this timely hearing. I want to thank the bureaus for all of
18 their hard work in preparing us for today.

19 CHAIRMAN KENNARD: Thank you, Commissioner.
20 Commissioner Powell, any closing remarks? Commissioner
21 Furchtgott-Roth?

22 MR. CICCONI: Mr. Chairman, I just wonder if I
23 could correct the record and Commissioner Ness here on the
24 60/90. I have checked with one of our experts here. The
25 60/90 build out is for two-way broadband. The trials are

1 going on to see how much, how quickly we can do the
2 telephony build out on top of that. We hopefully can get
3 back to you soon with some more precise figures on that. We
4 are hoping it is, obviously, quickly, but it is a two-stage
5 build out.

6 CHAIRMAN KENNARD: We do need that information,
7 Mr. Cicconi.

8 MR. CICCONI: We will get it to you, sir.

9 CHAIRMAN KENNARD: Thank you. With that, I will
10 adjourn by thanking our panelists and apologizing that we
11 are now almost -- well, actually over two hours over the
12 schedule today but I think that is a testament to the
13 quality of the witnesses and the complexity of these issues.
14 Just for the record, lest there be any concern out there in
15 the marketplace, this commission will not be holding public
16 hearings on the Exxon/Mobil merger.

17 (Laughter.)

18 Thank you all very much and thanks, especially, to
19 Tom Krattenmaker, Bill Rogerson, Michael Kende, Radhika
20 Karmarkar, Quyen Truong, and Royce Dickens of the FCC who
21 put all this together. Thank you all.

22 (Whereupon, at 4:06 p.m., the hearing was
23 adjourned.)

24 //


25 //

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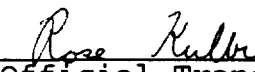


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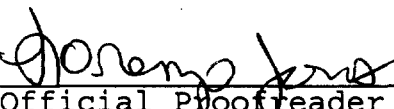


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